BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SHAWN W. HON	)	
Claimant	)	
V.	)	
	)	
BMS CONTRACT SERVICES	)	
Respondent	)	Docket No. 1,064,566
AND	)	
	)	
FARMINGTON CASUALTY COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the July 9, 2014, Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on November 4, 2014.

APPEARANCES

Stuart N. Symmonds of Emporia, Kansas, appeared for claimant. Ronald A. Prichard of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties agreed they were not contesting the ALJ's finding that claimant sustained a 19.5% whole body functional impairment.

ISSUES

ALJ Avery awarded claimant permanent partial disability benefits based upon a 19.5% whole body functional impairment. The ALJ found claimant was not permanently and totally disabled and was not eligible for work disability.

Claimant contends he is permanently and totally disabled, and it does not matter if he was terminated for cause. In the alternative, claimant asserts he has a 100% work disability and he was not terminated for good cause. Respondent contends the Award should be affirmed.

The issues before the Board are:

1. Is claimant permanently and totally disabled?

2. If not, is claimant eligible for work disability?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant began working for respondent on January 16, 2013. Part of his duties included operating a high pressure hose to push fat from slaughtered cattle off the floor. In February 2013, claimant's hands began hurting. He testified that on February 14, 2013, he had a discussion with his supervisor about falling behind because of not being able to hold onto the hose. Claimant left work before his shift was over. On February 15, 2013, claimant sought treatment at Newman Regional Health, where he was diagnosed with bilateral carpal tunnel syndrome and instructed to use splints and avoid aggravating activity. Claimant returned to work performing an accommodated job. The ALJ determined claimant's date of injury by repetitive trauma was February 15, 2013.

Following a preliminary hearing on April 19, 2013, ALJ Avery issued an Order for Medical Treatment requiring respondent to provide medical treatment to claimant with Dr. Lynn D. Ketchum. In his June 6, 2013, report, Dr. Ketchum opined claimant's heavy repetitive work for respondent was the prevailing factor causing his carpal tunnel syndrome and recommended bilateral carpal tunnel releases, which the doctor performed in 2013.

On December 5, 2013, Dr. Ketchum sent claimant's case worker a letter indicating that as of December 2, 2013, when he last saw claimant, claimant was at maximum medical improvement and could return to work with no restrictions.

At the regular hearing, claimant testified he was terminated in "June or July or April. Something like that. I cannot remember."[1] Claimant testified he was terminated for being absent because of being ill from an abscessed tooth. Records from Flint Hills Community Health Center/Lyon County Health Department Dental Clinic showed claimant was treated on May 8, 2013, for an abscessed tooth. Claimant testified that on the days he missed work for the abscessed tooth, he took paperwork to respondent. According to claimant, he worked for two weeks after he recovered from the abscessed tooth, during which time he missed no work. Claimant testified the only occasion he intentionally missed work without providing documentation was on a Monday and Tuesday when he got caught in a

[1] R.H. Trans. at 15.

blizzard in Lubbock, Texas, but respondent's plant was also closed due to inclement weather.

A copy of respondent's absence and tardy policy sets out seven rules. Rule 6 states excessive absenteeism for any reason will result in disciplinary action up to, and including, termination. Rule 7 indicates non-notification absences (no call/no show) for a consecutive three-day period will be considered a voluntary resignation.

A document placed into evidence by respondent at the regular hearing indicated claimant was absent from work 22 times between January 16 and May 29, 2013, with one absence being the day claimant reported his injury. The record contains several employee warning records regarding claimant. One is dated January 25, 2013. The date of violation is noted as November 24, 2013; however, the company remarks section of the warning indicates claimant did not show up for work on January 24, 2013.

Another warning is dated February 28, 2013. The date of violation is noted as January 26, 2013; however, the company remarks section of the warning indicates claimant was absent January 25 and February 19, 25 and 26, 2013. The warning indicated "Any further absenteeism will lead to termination."[2]

Another warning is dated May 10, 2013, the same date noted as the date of violation. The company remarks section indicates claimant had a no call/no show on May 10, 2013, and had missed work on January 25 and February 15, 25 and 26, 2013. The warning was signed by supervisor Arnold Salazar and plant manager Tino Velasquez and stated, "This is employee[']s 3rd warning, therefore employee is automatically terminated."[3] Respondent introduced a written statement signed by Mr. Velasquez indicating on March 15, 2013, claimant was sent home because of having alcohol on his breath. A warning signed by Mr. Salazar on May 22, 2013, indicated claimant missed work from May 10 through 15, 2013.

A termination report dated May 30, 2013, indicated claimant was terminated for "non-notification absences no call no show for a consecutive three day period. Considered voluntary resignation. day miss 5-24-13[,] 5-28-13[,] 5-29-13[,] 5-30-13."[4] The termination report indicated claimant's last day worked was May 23, 2013, and the date of his termination was May 30, 2013. An employer's separation statement dated June 10, 2013, indicated claimant was a no call and no show for three days and that respondent's policy provides if an employee does not come to work or call in, that results in an automatic

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[2] Hon Depo., Ex. 8.

[3] *Id.*

[4] *Id.*

dismissal. The employer's separation statement indicated claimant had been given warnings for absences on January 25, February 28 and May 10 and 22, 2013.

At his April 30, 2014, deposition, claimant indicated he had 23 teeth pulled the previous night. Claimant indicated he was excused by the Flint Hills Community Health Center from work from May 3 through 8, 2013, and from May 10 through 15, 2013. Claimant indicated he had gone to the health center for an abscessed tooth and a resulting inner ear problem. He testified that on May 22, 2013, he was given an employee warning record and told he was terminated for absences by a gentleman who was most likely Aurelio. Claimant indicated he was written up for not working May 10 through 15, 2013. However, May 11 and 12 were a Saturday and Sunday and he was not scheduled to work weekends. Claimant testified he did not work after May 22, 2013.

Claimant testified that if he missed work, he was to turn in a doctor's excuse. He indicated respondent preferred a call, leaving a message or coming by and letting someone know. However, if he did that, respondent would write him up, which made no sense. He acknowledged the note from Flint Hills Health indicating he was to be excused from work from May 3 through 8, 2013, is dated May 8. He also acknowledged the note from Flint Hills Health indicating he was to be excused from May 10 through 15, 2013, was dated May 13. Claimant indicated he was still unemployed. He was looking for work and provided a record of approximately 15 employers where he made job applications.

Aurelio Miranda, a safety supervisor for respondent, indicated that when claimant was hired, someone would have gone over respondent's absence and tardy policy with him. Mr. Miranda testified he learned of claimant's work injury when claimant told him around February 15, 2013, he was going home because his hands hurt. Mr. Miranda testified the only time he talked to claimant about his attendance was when claimant missed work due to a snowstorm. According to Mr. Miranda, he only became aware claimant missed work after claimant returned to work after the snowstorm. Mr. Miranda testified he did not speak to claimant around the time he was terminated and never told claimant he was terminated. Mr. Miranda believed claimant was never told at the plant that he was terminated.

Mr. Miranda indicated claimant was not terminated until May 30, 2013, and that was for missing work on May 24, 28, 29 and 30, 2013. He indicated that was the fourth time claimant was absent for three consecutive workdays.

Mr. Miranda was asked about claimant's job duties after he was placed on light duty. He testified:

> He was -- I took him out, tell him to follow a person that was picking up the meat, cleaning the drains to keep them from plugging up, keep them draining. And they also pick up all the meat, separate the trash from the meat. They all put it on barrels and then they go dump it on the cardboard vat or combo.

> But he was told not to do nothing, just follow the person and watch them to do that, what they did. So when he got released from the doctor, he was going to do that -- that work.[5]

Dr. Ketchum sent a letter dated December 11, 2013, to claimant's attorney indicating that pursuant to the *Guides*,[6] claimant had a 10% permanent functional impairment to each upper extremity that combined for a 12% whole person functional impairment. The doctor testified he gave claimant a 10% permanent functional impairment for each upper extremity because he felt claimant's carpal tunnel syndrome would improve to where it would be considered mild. Dr. Ketchum gave claimant restrictions on January 15, 2014, of no repetitive gripping or lifting more than 20 pounds for 30 days, but indicated the 30-day restriction could be changed upon re-evaluation. The doctor opined that when he gave the restrictions, claimant could no longer perform 23 of 23 job tasks identified by vocational consultant Bud Langston. When asked why he gave no restrictions on December 5, 2013, but gave 30-day restrictions on January 15, 2014, without seeing claimant, Dr. Ketchum testified:

> Well, I mean, those seem to be contradictory, and I don't have a good explanation for it except that I've had a lot of patients that tell me they want to go back to work but they can't go back to work with restrictions.
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> . . .
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> So I say they can go back to work without restrictions. But if somebody says, you know, should he have restrictions, usually someone that's within a year of post-op carpal tunnel I will give them some restrictions of no repetitive gripping.[7]

Dr. Ketchum indicated the 30-day restrictions he imposed expired in February 2014 and, based upon the medical documentation, he did not place claimant under any permanent restrictions. The doctor indicated that prior to claimant's surgeries, he had severe bilateral carpal tunnel syndrome that improved to moderate after the surgeries. Dr. Ketchum then indicated that with moderate carpal tunnel syndrome, claimant would have work restrictions, but in order to fine-tune the restrictions, either Dr. Ketchum needed to see claimant or a functional capacity evaluation was needed.

At the request of his counsel, claimant was evaluated by Dr. Daniel D. Zimmerman on January 13, 2014. Dr. Zimmerman reviewed claimant's medical records, took a history and physically examined claimant. The doctor, using the *Guides*, opined claimant had a

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[5] Miranda Depo. at 93.

[6] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[7] Ketchum Depo. at 21.

24% permanent functional impairment of the right upper extremity at the level of the wrist and a 25% permanent functional impairment of the left upper extremity at the level of the wrist that combined for a 27% whole person functional impairment.

Dr. Zimmerman gave claimant permanent restrictions of lifting no more than 20 pounds on an occasional basis and 10 pounds on a frequent basis. The doctor also restricted claimant from frequent flexion, extension, twisting, torquing, pushing, pulling, hammering, handling, holding and reaching activities using the upper extremities, as such activities would likely increase pain and discomfort affecting the right and left hands, wrists and digits. Dr. Zimmerman indicated claimant should avoid attempting to do fine digital functions using his hands, wrists and digits due to sensory symptoms, pain and discomfort, and weakness affecting the hands, wrists and digits. Dr. Zimmerman indicated claimant could no longer perform 23 of 23 job tasks identified by Mr. Langston.

Mr. Langston evaluated claimant at the request of claimant's attorney. He testified he obtained a job and education history from claimant and reviewed medical records from Drs. Ketchum and Zimmerman. Mr. Langston identified 23 tasks claimant performed in the five years preceding the date of his repetitive work injury. Mr. Langston indicated claimant was expelled from school in the 9th grade, but obtained his GED in 2004. According to Mr. Langston, claimant can read at a 6th grade level, but has enough education for the jobs he is qualified to do. From 2002 to 2009, claimant was incarcerated and while incarcerated received diesel mechanic training.

Mr. Langston indicated he looked up jobs available within claimant's restrictions in the Emporia area and identified two jobs claimant could do. The two jobs were cashiering jobs at a truck stop and at a CVS pharmacy. Mr. Langston asked claimant to check out those jobs. Claimant reported he did so, but was still unemployed. Mr. Langston was not asked if claimant was essentially and realistically employable in the open labor market.

Respondent requested claimant be evaluated by vocational consultant Michelle Sprecker. Ms. Sprecker obtained a work and education history from claimant and reviewed the permanent restrictions of Drs. Ketchum and Zimmerman. She testified claimant had an 8th grade education and while in prison from 2002 through 2009, earned his GED, obtained a certificate for completing a diesel mechanic apprenticeship and also earned some college credit hours. Claimant reported he had taught some of the classes from the diesel mechanic apprenticeship program.

Ms. Sprecker identified 33 job tasks claimant performed in the five years preceding his work injury. Ms. Sprecker indicated that considering Dr. Zimmerman's restrictions, claimant could not earn any type of wage and was permanently and totally disabled. Ms. Sprecker indicated the testing she conducted showed claimant's IQ was 83. If her testing was valid, Ms. Sprecker felt claimant would be limited to primarily entry level employment.

The ALJ determined claimant was not permanently and totally disabled, stating:

> The Court finds the claimant is not permanently and totally disabled. Claimant continued to work for the respondent at least sporadically after his injury. Mr. Miranda indicated claimant was being trained for a position that did not require the use of a high pressure hose. Bud Langston, a vocational expert hired by the claimant, did a labor market survey of the Emporia area and found two jobs he believed matched claimant's "vocational profile," i.e. his functional ability, education and training and age. Mr. Langston used restrictions by both doctors in arriving at the results of his survey. However, his report indicated he did not have Dr. Ketchum's "permanent" determination of no restrictions, but instead used an earlier restriction list of the doctor's which limited repetitive gripping and lifting to 20 pounds for a period of 30 days.[8]

The ALJ also found claimant was not eligible for work disability, stating:

> The claimant was unemployed at the time of the regular hearing. However, the wage loss did not arise from his injury rather his poor attendance at work. The Court recognizes that a portion of the days claimant was absent resulted from factors beyond his control and for which he was excused. The procedures used by the respondent to record attendance violations are not entirely accurate or consistent in their application. [Footnote: As an example the Employer's Separation Statement filed with the Department of Labor (ex. 5 to Hon deposition) asks for dates of absences if the termination was due to absenteeism. The statement lists January 25, 2013, February 28, 2013, May 10, 2013, May 22, 2013. However, three of those dates are not included in the lists of absences in ex. 8. May 22, 2013 was the date he was given his fourth warning for absenteeism and the claimant testified he was fired on that date. The one that is listed, May 10, 2013, was a date for which he was excused because of his medical reasons.] However, it is also apparent the claimant was absent a great deal for reasons having nothing to do with his health and which are not adequately explained in the record. [Footnote: In addition to the dates claimant was specifically warned about or discussed, the claimant was listed as absent on February 19, 20th, 25th, 26th, 27th and on March 15, (on this date he apparently was sent home because he smelled of alcohol.[)] (see p. 78 Miranda depo.) April 15th, May 16th and May 17th all in 2013.] It is therefore not surprising the employer chose to end its employment relationship with him. The Court finds claimant's wage loss, if any, did not arise exclusively from his injury and he is not eligible for work disability.[9]
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[8] Award at 8.

[9] *Id.* at 6-7.

> Although Dr. Ketchum may have added restrictions had claimant returned to see him, the only set of his permanent restrictions in the record was the doctor's note stating the claimant had no restrictions. The Court finds based upon the available evidence the claimant has the ability to return to a comparable wage job and therefore doesn't have a wage loss that would render him eligible for work disability.[10]

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[11] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[12]

K.S.A. 2012 Supp. 44-510c(a)(2) provides:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Expert evidence shall be required to prove permanent total disability.

K.S.A. 2012 Supp. 44-510e(a)(2)(A) states:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d, and amendments thereto. Compensation for permanent partial general disability shall also be paid as provided in this section where an injury results in:
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> (i) The loss of or loss of use of a shoulder, arm, forearm or hand of one upper extremity, combined with the loss of or loss of use of a shoulder, arm, forearm or hand of the other upper extremity;
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> (ii) the loss of or loss of use of a leg, lower leg or foot of one lower extremity, combined with the loss of or loss of use of a leg, lower leg or foot of the other lower extremity; or

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[10] *Id.* at 8.

[11] K.S.A. 2012 Supp. 44-501b(c).

[12] K.S.A. 2012 Supp. 44-508(h).

(iii) the loss of or loss of use of both eyes.

Claimant asserts he is permanently and totally disabled. If Dr. Ketchum's opinion that claimant has no permanent restrictions is adopted, claimant is not permanently and totally disabled. Ms. Sprecker indicated that if Dr. Zimmerman's restrictions were adopted, claimant is realistically and essentially unemployable. Mr. Langston identified two jobs he thought claimant could perform.

The ALJ indicated claimant worked for respondent after his injury and implied he was capable of earning comparable wages. Claimant asserts the job he was given after his February 15, 2013, injury was a sham job designed simply to keep him employed and that he had no real job duties. Therefore, claimant's accommodation was not valid. Claimant cited *Tharp*[13] in support of his argument. However, the facts in *Tharp* are not analogous to the facts of the current case. Tharp returned to work at a comparable wage, but in a job which required her to sit in a room by herself, waiting for someone to give her something to do. Tharp quit her job after only a month because she claimed it was humiliating for her to constantly have to ask for work and because she did not believe she was doing the company any good. Conversely, Mr. Miranda testified claimant was being trained for a job he could do after he was released from the doctor. The Board finds the job claimant was given following his date of injury was a real job.

The Board agrees with the ALJ's analysis that claimant was not permanently and totally disabled because his own vocational expert, Mr. Langston, identified two jobs claimant could perform within the restrictions of Dr. Zimmerman.

The Board believes claimant's restrictions lie somewhere between no restrictions and the extensive restrictions imposed by Dr. Zimmerman. With moderate carpal tunnel syndrome, as opined by Dr. Ketchum, some restrictions are justified. On the other hand, Dr. Zimmerman's restriction of avoiding attempting to do fine digital functions using the right and left hands, wrists and digits is excessive. That restriction would preclude claimant from performing virtually any and all job tasks and non-work activities.

The Board is keenly aware of *Wardlow*,[14] where the Kansas Court of Appeals looked at all the circumstances surrounding Wardlow's condition, including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently and totally disabled.

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[13] *Tharp v. Eaton Corp.,* 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[14] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

Claimant is 41 years old and has a GED. While his work background is limited to manual labor, claimant did complete a diesel mechanic apprenticeship and also earned some college credit hours while incarcerated. Simply put, after all the circumstances surrounding claimant's condition are considered, insufficient evidence was presented proving claimant is permanently and totally disabled.

The Board next turns its attention to the issue of claimant's eligibility for work disability. The ALJ ruled claimant was not eligible for work disability. K.S.A. 2012 Supp. 44-510e(a)(2)(C) states:

> An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:
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> (i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and
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> (ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.
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> In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

Claimant satisfied the provisions of K.S.A. 2012 Supp. 44-510e(a)(2)(C)(i) as his whole body functional impairment exceeds 7½%. Following claimant's injury, he continued working for respondent with no wage loss, until he was terminated in May 2013. The issue then becomes whether claimant sustained a wage loss of at least 10% directly attributable to the work injury. Wage loss is defined by K.S.A. 2012 Supp. 44-510e(a)(2)(E), which states:

> "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the

> post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.
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> (i) To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.
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> (ii) The actual or projected weekly value of any employer-paid fringe benefits are to be included as part of the worker's post-injury average weekly wage and shall be added to the wage imputed by the administrative law judge pursuant to K.S.A. 44-510e(a)(2)(E), and amendments thereto.
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> (iii) The injured worker's refusal of accommodated employment within the worker's medical restrictions as established by the authorized treating physician and at a wage equal to 90% or more of the pre-injury average weekly wage shall result in a rebuttable presumption of no wage loss.

The underlying issue is whether claimant was terminated from his job for cause. If claimant was terminated for cause, he sustained no wage loss under K.S.A. 2012 Supp. 44-510e(a)(2), as his wage loss was not caused by his work injury.

Respondent's absence and tardy policy provided an employee could be terminated for excessive absenteeism for any reason. Non-notification absences for a consecutive three-day period would be considered a voluntary resignation. Claimant was absent from work 22 days between January 16 and May 29, 2013, with one absence on the day of claimant's injury by repetitive trauma. Claimant asserts he was terminated on May 22, not May 30, 2013. If that is true, claimant was absent from work 17 days between February 16, the day after his injury, and May 22, 2013.

Claimant's chief argument is that he was told he was terminated on May 22, 2013, so he discontinued showing up for work. He disputes the allegation that under respondent's absenteeism policy, he voluntarily resigned on May 30, 2013, for not coming to work and not calling in for a consecutive three-day period. In essence, claimant is asserting that had he known he still had a job on May 22, 2013, he would have continued working and would not have been terminated.

The Board disagrees with claimant's argument for several reasons. Respondent's policy provided claimant could be terminated for excessive absenteeism. Claimant clearly was excessively absent, as he missed 17 days of work between February 16 and May 22, 2013. Claimant, as noted above, was given numerous written warnings for missing work.

Prior to May 22, 2013, claimant was absent for several consecutive three-day periods. From February 25 through 27, 2013, claimant missed work due to a blizzard in Texas and failed to notify respondent. He missed more than three consecutive workdays

from May 3 through 8, 2013, for an abscessed tooth. He was again absent for an abscessed tooth from May 10 through 15, 2013, yet his doctor's excuse was dated May 13, 2013. Even if claimant was fired on May 22, he was absent from work 17 days between February 16, the day after his injury, and May 22, 2013. Before being terminated, claimant was given several warnings about his absenteeism. Claimant's excessive absenteeism was not caused by his work injury.

The May 22, 2013, warning claimant was given does not indicate he was terminated. The warning merely indicates excessive absenteeism for any reason will result in disciplinary action up to, and including, termination. Mr. Miranda indicated neither he nor anyone in the plant told claimant he was terminated on May 22, 2013. Therefore, the Board finds claimant was terminated for cause on May 30, 2013, for being absent three consecutive days without notifying respondent. The Board concurs with the ALJ that procedures used by the respondent to record attendance violations were not entirely accurate or consistent in their application. However, the Board finds the evidence shows claimant was terminated for cause.

CONCLUSION

1. Claimant failed to prove he is permanently and totally disabled.

2. Claimant is not eligible for work disability.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[15] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the July 9, 2014, Award entered by ALJ Avery.

IT IS SO ORDERED.

[15] K.S.A. 2013 Supp. 44-555c(j).

Dated this ____ day of December, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Brad E. Avery, Administrative Law Judge